No. 93-2015

In The

Supreme Court of the United States

October Term, 1993

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A. W. FISH, G. W. GATTEN, RUSSELL N. ROGERS, R. J. WEBER, J. P. VALDEZ and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION, and J. G. BAILEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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July 18, 1994

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QUESTION PRESENTED

Whether Section 2 Fourth or Eleventh (c) of the Railway Labor Act, 45 U.S.C. Section 152 Fourth and Eleventh (c) make unlawful an agreement between a carrier, The Atchison, Topeka and Santa Fe Railway Company and its train service employees' collective bargaining representative, United Transportation Union, whereby train service employees are required to pay dues to United Transportation Union in order to continue to accumulate train service seniority when working outside the train service crafts in engine service.

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Respondents.

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents United Transportation Union, and J. G. Bailey, joined by Respondent The Atchison, Topeka and Santa Fe Railway Company, respectfully request that the Court deny the Petition for a Writ of Certiorari submitted by Petitioners.

OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS INVOLVED

Respondents accept Petitioners' identification as to Opinions below, Jurisdiction of the Court and Statutory Provisions Involved.

STATEMENT OF THE CASE

On July 6, 1992 The Atchison, Topeka and Santa Railway Company ("Santa Fe"), a carrier under the Railway Labor Act ("RLA"), 45 U. S. C. Section 151 *et seq.*, and United Transportation Union ("UTU"), a labor organization representing Santa Fe train service employees in collective bargaining under the RLA, entered into a letter agreement, Side Letter No. 11, whereby Santa Fe train service employees (interchangeably referred to as "ground" service employees) who do not pay full monthly dues to UTU after transferring out of train service to engine service will not "thereafter accumulate any additional" train service seniority while they remain outside the train service craft. While in train service, or upon return to train service, the agreement does not apply. (The pertinent agreement language appears in the Court of Appeals' opinion, Petitioners' Appendix, hereafter "App.", at 5a.) Contrary to Petitioners' "Question Presented", nothing in the disputed seniority accumulation agreement requires or allows Santa Fe to collect dues or deduct dues "from the wages of employees".

The Brotherhood of Locomotive Engineers ("BLE"), the collective bargaining representative of Santa Fe engineers, and eight individual Santa Fe employees sued

Santa Fe and UTU in the United States District Court for the Northern District of Illinois, claiming the agreement was invalid under Section 2 Fourth and Eleventh (c) of the RLA, 45 U. S. C. Section 152 Fourth and Eleventh (c), because it allegedly coerced train service employees to join the UTU and/or required membership in the UTU as a condition of continued employment.

On cross motions for summary judgment, the district court concluded that there was no violation of the RLA and dismissed the complaint, December 30, 1992. (App. 31a-44a, reported at 144 LRRM (BNA) 2551.) This dismissal was affirmed without dissent by the Court of Appeals for the Seventh Circuit, February 25, 1994 (App. 1a-28a), 16 F. 3d 832 (7th Cir. 1994), with unanimous denial of a request for reconsideration by the panel (App. 29a-30a).

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because Petitioners have established no basis for review by this Court. First, the opinion below does not conflict with any other court of appeals decision. Every court to have considered the question has rejected Petitioners' RLA Section 2 Fourth and 2 Eleventh claims, including two Circuit Courts of Appeals, the Seventh and Eighth, and three district courts. In addition to the decisions of the court of appeals and district court below, the claims were rejected in *Brotherhood of Locomotive Engineers v. The Kansas City Southern Railway Co.*, No. 93-2944, 1994 WL 202719 (8th Cir. May 26, 1994), affirming No. 93-5073-CV-

SW-1, United States District Court for the Western District of Missouri, and in *Carr v. Chicago Central and Pacific Railroad Company*, No. 92-C-5943, 1994 WL 234567 (N. D. Ill. May 26, 1994), appeal pending, No. 94-2531, United States Court of Appeals for the Seventh Circuit. Indeed, in response to Petitioners' request below, no judge of the full Seventh Circuit Court of Appeals requested a vote on *en banc* hearing. (App. 29a-30a.)

Second, the court below properly applied the law under Section 2 Fourth and the decisions of this Court in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U. S. 426 (1989) and *Virginian Railway Co. v. System Federation*, 300 U. S. 515 (1937). Under these cases, Section 2 Fourth prohibits carriers from acting with anti-union animus and from attempting to undermine, impair, or destroy a bargaining relationship. As the court below noted, Petitioners showed neither the requisite anti-union animus nor any attack on the bargaining relationship of BLE and Santa Fe.

Third, the district court and Seventh Circuit properly found that RLA Section 2 Eleventh (c) has no application because that provision applies only where there is an agreement made pursuant to subparagraph (a), that is, one that requires union membership "as a condition of continued employment". The agreement at issue requiring union dues in order to continue to accumulate seniority while working outside the craft does not constitute an agreement requiring membership as a condition of continued employment but only as an option to accrue additional seniority while absent.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

I. PETITIONERS HAVE PRESENTED NO CREDIBLE REASON FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI

The most crucial failing in the Petition is that it does not identify a reason for this Court to review this matter. There is certainly no conflict among the Circuits; indeed, the two courts of appeals to address the issue have each firmly rejected Petitioners' position. In addition to the decision of the Court of Appeals for the Seventh Circuit in the present case, see *Brotherhood of Locomotive Engineers v. The Kansas City Southern Railway Co.*, No. 93-2944, 1994 WL 202719 (8th Cir. May 26, 1994). In both that Eighth Circuit case and the present case, the court of appeals affirmed summary judgment granted by the district court. A third district court has also granted summary judgment on the same legal basis in *Carr v. Chicago Central and Pacific Railroad Company*, No. 92-C-5943, 1994 WL 234567 (N. D. Ill. May 26, 1994), appeal pending, No. 94-2531, United States Court of Appeals for the Seventh Circuit.

Nor is there an "important issue of federal law. . . ." S. Ct. Rule 10. Petitioners' claims involve relatively arcane issues of RLA Section 2 Fourth and 2 Eleventh jurisprudence and do *not* involve the threat of substantial labor disputes, employment terminations or matters which are frequently litigated in federal court. The decision below simply requires an affected train service employee to pay dues to UTU in order to continue accruing train service seniority while working outside the

craft. This is not the type of substantial dispute that requires this Court's attention.

II. THE SECTION 2 FOURTH CLAIM: THE COURT BELOW DID NOT MISAPPLY *TRANS WORLD AIRLINES, INC. V. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS* NOR OTHER DECISIONS OF THIS COURT

The court below did not misapply *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U. S. 426 (1989) and Section 2 Fourth. The court of appeals recognized that the primary thrust of Section 2 Fourth's prohibition of carrier "interference or coercion" concerned protection of employee rights of self-organization in the pre-certification period, that is, before a collective bargaining or union representative is identified or certified under the Act. In doing so, the court relied upon the precise language of *Trans World Airlines, Inc.* in which this Court noted:

> Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. 48 Stat. 1185. From the time of our very first opportunity to interpret the 1934 amendments, *we have viewed them as addressing primarily the pre-certification rights and freedoms of unorganized employees.* In *Virginian R. Co. v. Railway Employees*, 300 U. S. 515 (1937), we observed that the employees' freedom "to organize and make choice of their representatives without the 'coercive interference' and 'pressure' of a company union . . . was continued and made more explicit by the amendment of 1934. *Id.*, at 543, citing § 2 Third, § 2 Fourth, and *Texas and N.O. R. Co. v. Railway Clerks*, 281 U. S. 548

> (1930). In *Switchmen's Union v. National Mediation Bd.*, 320 U. S. 297 (1943), the Court divided over whether the federal courts have jurisdiction under § 2 Fourth to review a certification of union representatives for collective bargaining by the National Mediation Board acting under § 2 Ninth of the RLA as amended in 1934. Both the majority and dissent agreed, however, that *"[t]he 1934 Act was directed particularly at control over the initial step in collective bargaining – the determination of the employees' representatives." Id.*, at 317 (Reed, J. dissenting); see also *id.*, at 302 (opinion of the Court); *Machinists v. Street*, 367 U. S. 740, 759 (1961).

489 U. S. at 440-41 (emphasis added).

The "explanation for this pre-certification focus" of Section 2 Fourth was that the RLA is designed to provide for private dispute resolution, and the effectiveness of this process "depends upon the initial assurance that the employees' putative representative is not subject to control by the employer. . . . " 489 U. S. at 439-40.

Nevertheless, the court below recognized that Section 2 Fourth was not exclusively concerned with pre-certification conduct of the employer. In accord with the general purpose of the 1934 amendment to protect the employees' choice of a bargaining agent, and in reliance upon *Trans World Airlines, Inc.* (which like the instant matter involved post-certification actions of the employer), the court below held that after certification, Section 2 Fourth prohibited employer conduct that would "strike a fundamental blow to union or employer activity and the collective bargaining process itself." The court

simply found no such evidence in the record to "rebut Santa Fe and UTU's showing of no anti-union animus." (App. 24a.)

Other Circuits that have addressed the scope of Section 2 Fourth have been in accord with the court below. In *Brotherhood of Locomotive Engineers v. The Kansas City Southern Railway Company, supra,* the Eighth Circuit Court of Appeals upheld a nearly identical seniority accumulation agreement under both Section 2 Third and Fourth concluding that, as to post-certification employer actions, anti-union animus or interference with the bargaining relationship of BLE was required but not shown. And elsewhere among the Circuits, Section 2 Fourth relief, whether denied or granted, has been deemed available in the post-certification period where there is a fundamental attack on the bargaining process or bargaining agent. *Compare International Association of Machinists v. Northwest Airlines, Inc.,* 673 F. 2d 700, 706 (3rd Cir. 1982) (limited rights outside the representational context); *Air Line Pilots Association v. Texas International Airlines, Inc.,* 656 F. 2d 16 (2nd Cir. 1981) (Section 2 Third or Fourth relief only where carrier threatens fundamental provisions of the law such as in company union cases, citing *Texas and New Orleans R. Co. v. Railway Clerks,* 281 U. S. 548 (1930) and *Virginian Railway Company v. System Federation,* 300 U. S. 515 (1937)) *with Air Line Pilots Association v. Transamerica Airlines, Inc.,* 817 F. 2d 510 (9th Cir. 1987), *cert. denied,* 484 U. S. 963 (1988) (diversion of bargaining unit work to subsidiary to eliminate bargaining unit altogether); *Ruby v. Taca International Airlines, S. A.,* 439 F. 2d 1359 (5th Cir. 1974) (removal of crew base to foreign country with likely destruction of bargaining altogether).

Further, the decision below was not in conflict with *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U. S. 435 (1984) and *Communications Workers v. Beck*, 487 U. S. 735 (1988) as Petitioners contend. (Petition, p. 16.) *Ellis*, arising under RLA, and *Beck* under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 151 *et seq.*, involved issues concerning the statutory or constitutional rights of individuals to be free from paying dues to support non-collective bargaining activities of the labor organization. *Ellis* involved Section 2 Eleventh of RLA, not Section 2 Fourth, while *Beck* arose under LMRA as a duty of fair representation case although the Court relied upon Section 8(a)(3) in regard to the fair representation claim. Nevertheless, no fair representation claim exists in the present case, and Petitioners' seeming oblique invocation of that cause of action in attacking the Court below (Petition, p. 6), should be deemed of no consequence. Finally, in both *Ellis* and *Beck*, the agreements involved provided that membership was a condition of continued employment, a matter that we discuss *infra* in connection with the Section 2 Eleventh claim.

Because there is authority under the RLA interpreting and applying Section 2 Fourth in the limited fashion described, the Court below properly declined to rely upon additional LMRA cases that Petitioner cites, such as *Radio Officers Union v. NLRB*, 347 U. S. 17 (1954) (involving LMRA Section 8(a)(3) and 8(b), the latter of which has no counterpart at all under RLA), *Pattern Makers League v. NLRB*, 473 U. S. 95 (1985) (involving LMRA Section 8(b) which has no counterpart under RLA), or the Seventh Circuit's *NLRB v. Manitowoc Engineering Co.*, 909 F. 2d 963 (7th Cir. 1990) (involving again LMRA Section 8(a)(3) and

8(b)). This Court has consistently said that while "carefully drawn" analogies from LMRA may be looked to for guidance under RLA, the LMRA "cannot be imported wholesale" into RLA. *Trans World Airlines, Inc.* at 439. As described, Section 2 Fourth has its own distinct history that has established the scope of employer conduct prohibited.[1]

Accordingly, the court below did not misapply *Trans World Airlines, Inc.* nor misinterpret Section 2 Fourth.

III. THE COURT BELOW DID NOT MISAPPLY SECTION 2 ELEVENTH

Petitioners claim that Section 2 Eleventh (c) prohibits the agreement at issue. (Petition, pp. 23-28.) Petitioners' argument in this regard, however, skips over the crucial matter relied upon by the court below that subparagraph (c) is only a qualifier to subparagraph (a) of Section 2 Eleventh. The qualifier of (c) only operates in regard to an agreement made pursuant to subparagraph (a). Subparagraph (a) concerns agreement requiring union membership where such is a "condition of continued employment". Both courts below, as well as the Eighth Circuit and district court in *Brotherhood of Locomotive Engineers v. Kansas City Southern Railway Co., supra,* concluded

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[1] At page 23 of the Petition it is suggested that Section 2 Fourth addresses claims against a labor organization as well as an employer under RLA. Section 8(b) of the LMRA addresses labor organization conduct; but the plain language of Section 2 Fourth demonstrates that it does not.

that the seniority agreement here did not create a condition of continued employment. The train service employees working in engine service would continue working there, and would simply have the option of accumulating further train service seniority while outside train service upon payment of dues to the UTU (the train service bargaining agent).

Likewise, the court below properly rejected Petitioners' unwarranted speculative attempts to tie the agreement in issue to the traditional "union shop" agreement of Santa Fe-UTU, or to speculate as to what consequences might follow from implementation of the challenged agreement. Petitioners' arguments that (1) the disputed agreement was a kind of "union shop" agreement, that is, an agreement requiring membership as a condition of continued employment ("The union shop is a variant of the closed shop, since union membership is required of every employee . . . ", *Railway Labor Executives v. Hanson*, 351 U. S. 225, 231, fn. 3 (1956)), because it was a "signal or euphemism" regarding dues payment (Petition, p. 23), and, (2) that the disputed agreement was really one with a condition of continued employment or a union shop because of other agreements concerning layoffs (Petition, p. 23), did not make the seniority accumulation agreement more than it was. It did not make the seniority accumulation agreement into an agreement with a "condition of continued employment". Thus it was not made pursuant to Section 2 Eleventh (a) and hence the subparagraph (c) qualifier upon which Petitioners' claim is based was not pertinent.

Finally, Petitioners' reliance upon *Felter v. Southern Pacific Co.*, 359 U. S. 326 (1959), *Birkholz v. Dirks*, 391 F. 2d

289 (7th Cir. 1968), *vacated as moot*, 395 U. S. 210 (1969), and *O'Connell v. Erie Lackawanna Railroad*, 391 F. 2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U. S. 210 (1969) (Petition, pp. 25-28), is misplaced since those cases concerned agreements where union membership was a "condition of continued employment."

IV. CONCLUSION

The decision below was in accord with language of Section 2 Fourth and Eleventh, this Court's decision in *Trans World Airlines, Inc.*, the widespread cited authority of the Circuits, and the decision of every court to have considered the issues presented in the Petition. Thus, the Petition should be denied.

Respectfully submitted,

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